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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

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11 E SALVADOR BARRIOS,  
12 Plaintiff,  
13 v.  
14 H&R BLOCK BANK, et al.,  
15 Defendants.

Case No. 12cv2175 BTM(NLS)  
**ORDER GRANTING MOTIONS  
TO DISMISS FIRST AMENDED  
COMPLAINT**

16 Defendant San Diego Financial Services, Inc. ("SDFS") and H&R Block  
17 Bank ("H&R") have filed motions to dismiss Plaintiff's First Amended Complaint  
18 ("FAC"). For the reasons discussed below, Defendants' motions are  
19 **GRANTED.**

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21 **I. BACKGROUND**

22 On or about November 8, 2006, Plaintiff E. Salvador Barrios ("Plaintiff")  
23 borrowed \$562,500 from Paramount Equity Mortgage. The note was secured  
24 by a Deed of Trust. (H&R's RJN, Ex. 1.) The Deed of Trust attached a legal  
25 description of the property ("Property"), identified as assessor's parcel no. 479-  
26 250-06: "South 170 feet of the West 1/2 of the West 1/2 of Lot 34 of  
27 subdivision, Lot 12 of Rancho Mission of San Diego, City of Lemon Grove,  
28 County of San Diego, State of California, per Map no. 5 of the San Diego

1 County Recorder except East 20 feet and except West 210 feet.” The Deed of  
2 Trust listed the Property Address as “7042 San Miguel, Lemon Grove,  
3 California, 91945-2135.”

4 In a Corporation Assignment of Deed of Trust executed on March 30,  
5 2011, and recorded on April 11, 2011, Sand Canyon Corporation fka Option  
6 One Mortgage Corporation assigned all beneficial interest under the Deed of  
7 Trust to H&R. (H&R’s RJN, Ex. 5.) (Documents assigning beneficial interest  
8 under the Deed of Trust to Sand Canyon Corporation are not part of the record,  
9 but Plaintiff does not dispute that the Deed of Trust had previously been  
10 assigned to Sand Canyon Corporation.)

11 On April 24, 2012, Quality Loan Service Corp. (“QLS”), which identified  
12 itself as the “Trustee,” recorded a Notice of Default against the Property.  
13 (H&R’s RJN, Ex. 2.) According to the Notice of Default, Plaintiff was in default  
14 in the amount of \$15,090.92. The Notice indicated that if Plaintiff wished to  
15 arrange for payment or had questions about payment, Plaintiff should contact  
16 H&R.

17 On July 30, 2012, QLS recorded a Notice of Trustee’s Sale. (H&R’s RJN,  
18 Ex. 3.) On August 23, 2012, a Trustee’s Sale was held, and SDFS purchased  
19 the Property. (FAC ¶¶ 35-36.)

20 On August 30, 2012, a Trustee’s Deed Upon Sale was recorded. The  
21 deed lists the grantee of the Property as SDFS. (H&R’s RJN, Ex. 4.)

22 A 3-day notice to quit was served at 7042 San Miguel Ave. as well as  
23 2728 Cornelius Place, which is also on parcel no. 479-250-06 and has the  
24 same legal description. (FAC ¶¶ 37-38, 57)

25 On September 4, 2012, Plaintiff commenced this action.

26 In an Order filed on March 25, 2013, the Court granted a motion to  
27 dismiss filed by SDFS.

28 On April 12, 2013, Plaintiff filed the FAC.

## II. STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should be granted only where a plaintiff's complaint lacks a "cognizable legal theory" or sufficient facts to support a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988). When reviewing a motion to dismiss, the allegations of material fact in plaintiff's complaint are taken as true and construed in the light most favorable to the plaintiff. See Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). Although detailed factual allegations are not required, factual allegations "must be enough to raise a right to relief above the speculative level." Bell Atlantic v. Twombly, 550 U.S. 544, 555 (2007). "A plaintiff's obligation to prove the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not show[n] that the pleader is entitled to relief." Ashcroft v. Iqbal, 565 U.S. 662, 679 (2009) (internal quotation marks omitted). Only a complaint that states a plausible claim for relief will survive a motion to dismiss. Id.

## III. DISCUSSION

SDFS and H&R move for dismissal of the FAC pursuant to Fed. R. Civ. P. 12(b)(6). As discussed below, the Court finds that dismissal of the FAC is warranted because Plaintiff has failed to state a claim against Defendants.

### A. Quiet Title Claim as to 7042 San Miguel Ave.

Plaintiff's first cause of action is to quiet title with respect to 7042 San Miguel Ave. As in the original complaint, Plaintiff alleges that H&R lacked standing to assert the power of sale in the Deed of Trust because Plaintiff was

1 never notified of an assignment of beneficial status and rights to H&R as  
2 required under 15 U.S.C. § 1641(g) and Cal. Civil Code § 2932.5. (FAC ¶ 48.)

3 For the reasons discussed in the Court's prior order, neither 15 U.S.C. §  
4 1641(g) nor Cal. Civil Code § 2932.5 supports Plaintiff's claim that H&R lacked  
5 standing to initiate nonjudicial foreclosure. (Order Granting Motion to Dismiss  
6 (Doc. No. 9) at 3-4.) Therefore, Plaintiff's quiet title claim as to 7042 San  
7 Miguel Ave. is dismissed for failure to state a claim.

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9 C. Quiet Title Claim as to 2728 Cornelius Place

10 Plaintiff's second cause of action is to quiet title with respect to 2728  
11 Cornelius Place. As in the original complaint, Plaintiff contends that because  
12 2728 Cornelius Place was not mentioned in the Deed of Trust, Defendants had  
13 no power of sale with respect to the address.

14 As discussed in the Court's prior order, Plaintiff's argument regarding  
15 2728 Cornelius Place lacks merit. (Order Granting Motion to Dismiss at 4-6.)  
16 The Deed of Trust included the parcel number as well as the legal description  
17 of the Property, even if it did not include the specific address of 2728 Cornelius  
18 Place. The Notice of Default and Notice of Trustee's Sale also included the  
19 necessary identifying information regarding the Property (i.e., parcel number  
20 and/or instrument number of the Deed of Trust).

21 Plaintiff has not alleged facts establishing that the sale of 2728 Cornelius  
22 Place was invalid. Therefore, Plaintiff's quiet title claim as to 2728 Cornelius  
23 Place is dismissed as well.

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25 D. TILA Claim

26 In his fourth cause of action, Plaintiff alleges that H&R violated 15 U.S.C.  
27 § 1641(g), a provision of the Truth in Lending Act ("TILA"). Section 1641(g)  
28 provides that when a "mortgage loan is sold or otherwise transferred or

1 assigned to a third party,” a “creditor that is the new owner” is required to notify  
2 the borrower of the transfer within thirty days. TILA authorizes actual damages,  
3 statutory damages, and attorney’s fees for violations of § 1641(g). 15 U.S.C.  
4 §1640(a).

5 Plaintiff’s TILA claim is barred by TILA’s one year statute of limitations.  
6 15 U.S.C. § 1640(e). The assignment of the Deed of Trust to H&R was  
7 recorded on April 11, 2011. This action was not commenced until September  
8 4, 2012. Plaintiff has not alleged any facts supporting equitable tolling of the  
9 limitations period. Indeed, Plaintiff alleges in the FAC that he obtained a  
10 second loan modification from Defendant, presumably H&R, around April 2011,  
11 and that he was in contact with Defendant on a regular basis in 2011 to discuss  
12 the possibility of further loan modification or other alternatives. (FAC ¶ 24.)  
13 Therefore, Plaintiff must have known that the Deed of Trust had been assigned  
14 to H&R and has no basis for invoking the doctrine of equitable tolling.

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16 E. Waiver and Estoppel

17 Plaintiff’s fifth and sixth causes of action are for “waiver” and “estoppel.”  
18 Plaintiff contends that H&R waived any right to disaffirm a continuation of the  
19 second modification by continuing to accept 10 months of additional payments  
20 by Plaintiff after March 2011. Plaintiff also contends that H&R is estopped from  
21 denying the continuation of the second modification.

22 As discussed in the Court’s prior order, Plaintiff’s waiver and estoppel  
23 claims fail because waiver and estoppel are doctrines that operate defensively  
24 only and cannot be raised to undo a foreclosure sale that has already been  
25 completed. (Order Granting Motion to Dismiss at 6.)

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1 F. Fraud and Negligent Misrepresentation

2 In his seventh and eighth causes of action, Plaintiff asserts claims of  
3 fraud and negligent misrepresentation in connection with H&R's denial of his  
4 application for a third loan modification.

5 Plaintiff's claims for fraud and negligent misrepresentation are based on  
6 the following facts. About April 2011, Defendant agreed to a second loan  
7 modification, the terms of which would continue until January 2012. (FAC ¶  
8 19.) (No documentation regarding the second loan modification has been  
9 provided.) Plaintiff made payments to Defendant under the second  
10 modification until January 2012. (FAC ¶ 23.) From January 2011 to just prior  
11 to January 2012, Plaintiff made calls to Defendant to discuss further loan  
12 modification or alternatives. (FAC ¶ 24.) During this time period, Defendant  
13 told Plaintiff that he did not qualify for anything and that foreclosure was his  
14 only option. (Id.)

15 On or about January 2012, Defendant increased the monthly mortgage  
16 payment amount. (FAC ¶ 25.) Plaintiff stopped making payments because of  
17 the increased amount and because his experience was that Defendant would  
18 not entertain any significant discussions about loan modification or other  
19 alternatives until Plaintiff stopped making payments. (Id.)

20 On or about March 2012, a representative of Defendant named Temidire  
21 Bada ("Bada") contacted Plaintiff to discuss possible further loan modification.  
22 (FAC ¶ 26.) Plaintiff informed Defendant that he desired a permanent loan  
23 modification or at least to continue the payment amount that was accepted by  
24 Defendant under the second loan modification. (Id.) Plaintiff had ongoing  
25 discussions with Bada about his financial condition from March 20, 2012  
26 through August 21, 2012. (FAC ¶ 28.) Plaintiff provided Bada with requested  
27 financial information, including a loan modification application, tax returns, bank  
28 statements, and pay stubs. (Id.) Each time Plaintiff inquired about the status

1 of his application, Bada told Plaintiff that it was in the hands of the underwriters.  
2 (FAC ¶ 32.) In an effort to find a reasonable alternative to foreclosure, Plaintiff  
3 submitted documentation from an interested buyer for a proposed short sale,  
4 but Defendant never acknowledged or discussed the proposed short sale. (Id.)

5 On August 21, 2012, two days before the Trustee Sale, Plaintiff spoke  
6 with Bada, who informed Plaintiff that he did not qualify for a loan modification.  
7 (FAC ¶ 34.) The only reason given by Bada regarding Plaintiff's failure to  
8 qualify was that "Plaintiff had a prior loan modification with Defendant." (Id.)  
9 Defendant never disclosed to Plaintiff that a prior loan modification disqualified  
10 him from further loan modification consideration. (Id.)

11 Plaintiff alleges that H&R defrauded him by concealing, until it was too  
12 late, that he would not qualify for the third modification because of his prior loan  
13 modification. However, the facts alleged by Plaintiff do not support his claims  
14 for fraud and negligent misrepresentation. Although Bada stated that the  
15 reason for the denial was that "Plaintiff had a prior loan modification with  
16 Defendant," there is no evidence that the prior modification was *an automatic*  
17 *bar* to further modification. If prior modification was one of many factors that  
18 could be considered by the underwriters in deciding whether to grant  
19 modification, Bada could not have said with certainty that Plaintiff would not  
20 qualify. Plaintiff does not allege that Bada ever represented that he would  
21 qualify for the modification or that approval was likely. Indeed, Plaintiff admits  
22 that during the prior year, Defendant told Plaintiff that he did not qualify for  
23 anything and that foreclosure was his only option.

24 Furthermore, Plaintiff has not established that he was damaged by  
25 Defendant's actions. Plaintiff stopped making mortgage payments in January  
26 2012 and needed a modification because he could not afford the regular  
27 payment. (FAC ¶ 25.) Even if Plaintiff had known earlier that he would not  
28 receive a third modification, Plaintiff has not alleged facts showing that he

1 could have done something to prevent foreclosure. He was already in default  
2 by the time he began communicating with Bada in March 2012.

3 Therefore, Plaintiff's fraud and negligent misrepresentation claims are  
4 dismissed for failure to state a claim.

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6 D. Declaratory Relief & Cal. Bus. & Prof. Code § 17200

7 Plaintiff's third cause of action seeks declaratory relief that (1) the Trustee  
8 Sale is void as to 7042 San Miguel Avenue because H&R Block has no  
9 standing to assert the power of sale under the Deed of Trust; (2) the Trustee  
10 Sale is void as to 2728 Cornelius Place because that address was never  
11 subject to the power of sale under the Deed of Trust; and (3) H&R is estopped  
12 from denying a continuation of the second modification. Plaintiff's ninth cause  
13 of action alleges that H&R engaged in unlawful, unfair, and fraudulent conduct  
14 in violation of Cal. Bus. & Prof. Code § 17200 by failing to give notice of the  
15 assignment and failing to disclose that H&R had no intention of ever agreeing  
16 to a third modification.

17 Plaintiff's declaratory relief claim and § 17200 claim are premised on  
18 Plaintiff's other claims, which are discussed above. Because Plaintiff's other  
19 claims fail to state a claim, Plaintiff's declaratory relief and § 17200 claims fail  
20 as well.<sup>1</sup>

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25 <sup>1</sup> In Paragraph 91 of the FAC, Plaintiff states that he seeks remedies including but  
26 not limited to injunctive relief "and a determination that the Trustee sale is and was in  
27 violation of the same legal principles set forth in California's Homeowner's Bill of Rights,  
28 which in part prohibits dual tracking and a foreclosure of property while a borrower is in the  
process of obtaining a loan modification." Plaintiff does not specify whether any particular  
provision of the California Homeowner's Bill of Rights ("HBOR") was violated. Moreover, the  
HBOR was enacted July 11, 2012, and its amendments did not go into effect until January  
1, 2013. See McGough v. Wells Fargo Bank, N.A., 2012 WL 5199411, at \* 5 n. 4 (N.D. Cal.  
Oct. 22, 2012).

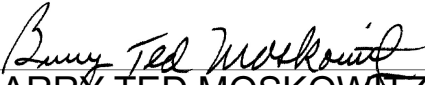


1 **IV. CONCLUSION**

2 For the reasons discussed above, Defendants' motions to dismiss are  
3 **GRANTED.** Plaintiff's First Amended Complaint is **DISMISSED** without  
4 prejudice for failure to state a claim. The Clerk shall enter judgment  
5 accordingly.

6 **IT IS SO ORDERED.**

7 DATED: August 6, 2013

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9 **BARRY TED MOSKOWITZ**, Chief Judge  
10 United States District Court  
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